IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. ~~929~~ 33

PAUL E. SULLIVAN, ET AL., *Petitioners*

v.

LITTLE HUNTING PARK, INC., ET AL.

T. R. FREEMAN, JR., ET AL., *Petitioners*

v.

LITTLE HUNTING PARK, INC., ET AL.

On Writ of Certiorari to the Supreme Court of Appeals of Virginia

BRIEF FOR THE RESPONDENTS

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INDEX

CITATIONS

STATUTORY AND CONSTITUTIONAL

MISCELLANEOUS

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BRIEF FOR THE RESPONDENTS

QUESTIONS PRESENTED

1. Whether the Virginia Supreme Court of Appeals has the right to establish reasonable rules of procedure, indiscriminately applied, for the perfecting of appeals before that court.

2. Whether this Court will entertain a "moot" question when the opinion cannot effect the rights of the litigant.

3. Whether two litigants may combine their appeals before this Court to enable one litigant to rely on the statute available to the other.

4. Whether 42 U S C § 1981, 1982, guarantees to a member of the negro race the right to membership in a private social club.

5. Whether the First and Fourteenth Amendments, as they pertain to free speech, apply to directors of a private social club if the club performs a function that is also performed by the state or a division thereof.

LITTLE HUNTING PARK, INC.

In 1954, when Little Hunting Park was incorporated, as a non-stock corporation, the word "Community" appeared in the certificate of incorporation to indicate the original intention of the founders that membership be limited to the geographical area contiguous to the facilities. The by-laws provided for "membership certificates" (the same instruments that the petitioners elect to call "shares" in their brief) and membership is limited to those who own a membership certificate and are approved by the board of directors after recommendation by the membership committee. The by-laws further provide that the purpose of the corporation shall be to provide recreation for its members and not the public at large nor members of the community.

It is usual in the operation of clubs to require an initiation fee which is forfeited when membership ceases. However, the by-laws and operation of Little Hunting Park provide for a non-forfeiture of this initial payment and allows a transfer or assignment of this membership certificate representing the initial payment. The assignee or purchaser must submit an application to the Board of Directors of the club for membership. To become a member one must acquire a membership certificate *and* be approved for membership by the Board of Directors. A temporary assignment was permitted but the approval of the assignee was required by the Board of Directors. The approval of the Board of Directors has always been required. (A 50)

Although the by-laws provide that membership shall be limited to the areas contiguous to the club property and "such other area(s) as may be approved by the Board of Directors", the Board has freely construed this provision as to "such other area(s)" and 117 of approximately 530 members lived outside the contiguous areas (A 163) at the time of the trial.

Since the ownership of a membership certificate did not confer membership in the club, the developer of the area purchased certificates when the corporation was formed. His motive can only be presumed but it would follow that possibly he may have decided to assist in the formation of the club or to have membership certificates in the event a subsequent customer may express an interest in the club. A local church purchased a certificate to transfer to its minister.

The petitioners realized the prerequisites of membership and submitted the required request to the Board of Directors for approval.

The records of the corporation did not disclose those instances where applications were denied, therefore, the petitioners' brief states that "there is no record of any assignment ever being denied". When a witness recalled that a membership was denied but could not recall the reason, the petitioners brief states "but there is no evidence that this was other than because of the individual failure to satisfy the geographical requirement of the by-laws".

Although it is implied in the brief that the operation of Little Hunting Park was strictly a recreation facility, one of the petitioners testified to the social activities that were carried on by the members (A 228, 229, 230).

Little Hunting Park has all the attributes of a voluntary social club. It is voluntary, it has members, it is social, it is not open to the public but limited to members, dues are assessed and no admission is charged. Prospective members must be accepted by the governing body, and membership is limited and, it serves no public or community purpose for less than 15% of the residents of the petitioners' subdivision were members.

PARTIES

In the trial court, the petitioners Freeman and Sullivan maintained separate actions. For the purpose of appeal to this Court they consolidated their cases. Although they have a common respondent and contend that the causes of action arose out of the same set of circumstances, the law applicable to each does vary. Freeman, who is of the Negro race, relies on the Civil Rights Acts of 1866 (42 U.S.C. § 1981 and 1982), as well as the Thirteenth and Fourteenth Amendments to the United States Constitution. However, since the Freemans no longer reside in the United States their

claim is limited solely to compensatory and punitive damages.

Sullivan, who is of the White race, relies on the First and Fourteenth Amendments to the United States Constitution, contending that their expulsion from the respondent club was because of his dissent from its racial policies, and hence their right of free speech was abridged. In addition, since his "speech" concerned the refusal of a Negro application to a club, if the Civil Rights Act of 1866 is applicable to the Club, then his expulsion from membership also falls within the provisions of the Civil Rights Act of 1866.

The Civil Rights Act of 1866 supplemented the Thirteenth Amendment and applied to members of the Negro race. The Thirteenth Amendment abolished involuntary servitude. It is not the contention of Sullivan that he is of the Negro race; nor does he contend that he is one affected by the Thirteenth Amendment.

Although the brief of the petitioners contains a statement citing *DANIEL v. PAUL*, 37 U.S. L. Week 4481, 4482, (June 2, 1969), which rested on Title II of the Civil Rights Act of 1964 (42 U.S.C. § 2000, et seq), their "Questions Presented" does not include a question as to the applicability of the public accommodations section of that enactment.

It will be necessary to properly apply the law, to the two cases, to return to the division that existed in the trial court by listing the name of each as a subheading above each division of this brief.

A FEDERAL QUESTION

Sullivan and Freeman

The Petitioners base the jurisdiction of this appeal

on 28 U.S.C. 1257(3) which authorizes the review of this Court of the final judgment of the highest court of a state:

> By writ of certiorari, where the validity of a treaty or statute of the United States is drawn into question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

The Virginia Supreme Court of Appeals rejected the petition and refused the appeal of the petitioners since the appeal was not perfected in the manner provided by law in that opposing counsel was not given a reasonable written notice of the time and place of tendering the transcript and a reasonable opportunity to examine the original or a true copy of it pursuant to Rule 5:1 § 3(f) of the Rules of the Supreme Court of Appeals of Virginia.

HERB v. PITCAIRN, 324 U.S. 118, 65 S.Ct. 459, involved a question of procedure in the state court. The highest court of Illinois held that suit under Federal Employers' Liability Act should not have been filed in a city court when the injuries were sustained outside the territorial limits of the city. The matter was continued for a determination as to whether the decision of that court was based on state procedure or a federal question. The case is of interest because of the restatement of this Court's position on the review of a state court's decision based on state grounds.

At 324 U.S. 126, Justice Jackson stated:

> This court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. (citations) The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitionery of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to corrcet them to the extent that they incorrectly adjudge federal rights.

Speaking of the right of a state court to determine procedure, at page 123 the opinion stated:

> The freedom of the state courts so to decide is, of course, subject to the qualification that the course of action must not be discriminated against because it is a federal one. *McKNETT v. ST. LOUIS & S.F.R. Co.*, 292 U.S. 230, 54 S.Ct. 690, 78 L. Ed. 1227. But we cannot say the court below, in so far as it did hold the city courts without power, construed the state jurisdiction and venue laws in a discriminatory fashion. *DIXON v. DUFFY* 342 U.S. 33, 72 S.Ct. 10; *YOUNG v. RAGEN* 337 U.S. 235, 69 S.Ct. 1073.

The state court cannot develop a novel procedure to dispose of a federal question. *NAACP v. STATE OF ALABAMA*, 357 U.S. 449, 78 S.Ct. 1163. Nor can a state develop procedural bars to the assertion of a federal question. *DOUGLAS v. STATE OF ALABAMA* 380 U.S. 415, 85 S.Ct. 1072.

The Constitution of Virginia § 88, in providing for the composition and jurisdiction of the Supreme Court

of Appeals provides, in part, as follows:

> Subject to such reasonable rules as may be prescribed by law as to the course of appeals, the limitation as to the time, the value, amount or subject matter involved, the security required, if any, the granting or refusing of appeals, and the procedure therein, it shall, by virtue of this Constitution, have appellate jurisdiction in cases involving the constitutionality of a law as being repugnant to the Constitution of this State or of the United States, or involving the life or liberty of any person; and in such other cases as may be prescribed by law.

Section 8-1.1 of the Code of Virginia 1950 empowers the Supreme Court of Appeals to "prescribe the forms of writs and make general regulations for the practice of all courts of record, civil and criminal; and may prepare a system of rules of practice and a system of pleading and the forms of process to be used in all courts of record of the state, and put the same into effect".

Pursuant to the above statute, the Supreme Court of Appeals promulgated Rules of Supreme Court of Appeals of Virginia, and under its section on appellate proceedings, there is Rule 5:1 § 3(f) which provides:

> Such a transcript or statement not signed by counsel for all parties becomes part of the record when delivered to the clerk, if it is tendered to the judge within 60 days and signed at the end by him within 70 days after final judgment. It shall forthwith be delivered to the clerk who shall certify on it the date he receives it. *Counsel tendering the transcript or statement shall give counsel reasonable written notice of the time and place of tendering it and a reason-*

> *able opportunity to examine the original or a true copy of it.* (Italics supplied)

The Supreme Court of Appeals of Virginia has interpreted this rule on many occasions. The case of *SNEAD v. COMMONWEALTH*, 200 Va 850, 108 S.E. 2d 399, decided in 1959, stated:

> The plain language of the Rule requires *counsel* to *give* opposing counsel reasonable written notice of the time and place of tendering the transcript or narrative of the evidence *and* to *give* him a reasonable opportunity to examine it. The duty rests on counsel to afford the reasonable opportunity to examine and not the trial judge. (Italics in Decision)

In *SNEAD v. COMMONWEALTH*, supra, *COOK v. VIRGINIA HOLSUM BAKERIES, INC.*, 207 Va 815, 153 S.E. 2d 209, and *BACIGALUPO v. FLEMING*, 199 Va 827, 102 S.E. 2d 321, prior notice was given to opposing counsel and the court was to determine whether the notice and opportunty to examine was reasonable under the Rule.

Counsel for the petitioners served written notice on Counsel for respondents by a letter dated Friday, June 9, 1967, that on that same afternoon he would deliver the transcript to the trial judge. In the usual course of mail delivery, the notice was received by counsel for respondents on the next business day, Monday, June 12, 1967. The "reasonable" written notice required by the rule was given to opposing counsel three days after the tender of the transcript to the trial judge.

Rule 5:1 § 3(f) contains language similar to that used in §6252 of the Code of Virginia, 1919. In construing this section, the Virginia court in *OCEAN*

ACCIDENT CORP. v. HALEY 158 Va 691, 164 S.E. 538, held:

> "That the provision of the statute is mandatory, and that the notice was not reasonable within the plain meaning of its terms, which are jurisdictional".

The holding of the Supreme Court of Appeals of Virginia has been consistent with all past interpretations of its rule. Its ruling, in this case, was limited to the state question of procedure.

WOLFE v. STATE OF NORTH CAROLINA, 364 U.S. 177, 80 S.Ct. 1482, involved the procedure used by the Supreme Court of North Carolina in dismissing an appeal of a trespass conviction. Citing *NICHOL v. COLE*, 256 U.S. 222, 41 S.Ct. 467, Justice Stewart stated:

> When as here there can be no pretense that the (state) court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong.

In upholding the decision of the North Carolina Court, this Court held:

> The North Carolina Supreme Court did not decide this asserted federal question. We have found that it did not do so because of the requirement of rules of state procedural law within the Constitutional power of the States to define, and here clearly delineated and even-handedly applied. We have no choice but to determine that this appeal must be dismissed because no federal question is before us. That

determination is required by principles of judicial administration long settled in this Court, principles applicable alike to all litigants, irrespective of their race, color, politics, or religion.

It is contended by the petitioners that the remand to the Supreme Court of Appeals of Virginia (392 U.S. 657) "impliedly" held that the non-federal ground on which the Virginia Court rejected the original appeals was inadequate The remand was "for further consideration in light of *JONES v. ALFRED H. MAYER Co.* 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed. 2d 1189". There was no determination actually or impliedly on the non-federal ground and, after the Virginia Court differentiated between the two cases, held that it had no jurisdiction under its rules of procedure.

The petitioners further contend that the dismissal of the appeal by the Virginia Court was arbitrary and unreasonable and that they fully complied with Rule 5:1 § 3(f). To sustain their contention that the court was arbitrary and "ignored its own precedents", they tried to ignore *SNEAD v. COMMONWEALTH*, supra, by hiding it in a footnote on page 21 of their brief.

Compliance with Rule 5:1 §3(f) requires reasonable written notice of the tendering of the transcript *and* a reasonable opportunity to examine the original or a true copy. The written notice was received three days after the presentation to the trial judge and a copy of the extensive transcript, fraught with errors, was given to counsel for the respondents, seven days after notice, in the Courthouse at 1:20 P.M. on a Friday afternoon, to be returned to counsel for petitioners on the following Monday at 6:30 P.M. Counsel for respondents had one working day plus two hours to examine and correct the

testimony at four days of trial. However, the requirements of notice and an opportunity to examine are conjoined and not in the alternative.

THE QUESTION IS MOOT

Freeman

DOREMUS v. BOARD OF EDUCATION, 342 U.S. 429, 72 S.Ct. 394, was a suit by a taxpayer and the father of a seventeen-year-old child to contest a New Jersey statute requiring the reading of the New Testament in the schools. When the matter reached this Court the girl had been graduated and the Court held:

> Obviously no decision we could render would protect any rights she may have once had, and this court does not sit to decide arguments that have been put to rest.

EX PARTE BAEZ, 177 U.S. 378, 20 S.Ct. 673, held:

> It is well settled that this court will not proceed to adjudication where there is no subject matter on which the judgment of the court can operate.

AMALGAMATED ASS'N etc. v. WISCONSIN EMPLOYMENT RELATIONS BOARD, 340 U.S. 416, 71 S.Ct. 375, citing *UNITED STATES v. ALASKA S.S. CO.*, 253 U.S. 113, 40 S.Ct. 448, held:

> A Federal Court is without power to decide moot questions or give advisory opinions which cannot effect the rights of the litigants in the case before it.

The Petitioner Freeman, having left the United States, is no longer interested in the use of the facilities of the respondent Club but seeks only compensatory and

punitive damages under the Civil Rights Act of 1866.

But, does the Civil Rights Act of 1866, under which he is now proceeding, give him a right to damages for the alleged deprivation of civil rights?

At this time, the latest interpretation of the Civil Rights Act of 1866 was contained in *JONES v. ALFRED H. MAYER CO.* supra. Speaking for the court, Justice Stewart said:

> At the offset, it is important to make clear precisely what this case does not involve. . . . . It does not deal specifically with discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling. . . . *And* although it can be enforced by injunction, *it contains no provision expressly authorizing a federal court to order the payment of damages.* (Italics supplied)

If a cause of action for damages is available to him under civil rights legislation, it would be available under 42 U.S.C. § 1983 of the law which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

The purpose of the foregoing statute is plain from the title of the legislation, "An Act to enforce the Provisions of the Fourteenth Amendment to the Consti-

tution of the United States, and for other purposes". 17 Stat. 13. *MONROE v. PATE*, 365 U.S. 167, 81 S.Ct. 473.

To hold that this statute would apply to individuals, not acting under the badge of state authority, would make the Fourteenth Amendment and the First Amendment applicable to such individuals and would cause a deluge of actions between individuals, not only on the basis of civil rights, but on questions of free speech, press, religion, etc.

Among the proponents of a cause of action for damages under subsequent civil rights legislation, they are unanimous that the enactments did not provide a right to sue for damages. The remedies provided by the Civil Rights Act of 1964 are conciliatory and coercive action cannot be taken against violators of that act. 42 U.S.C. § 2000 e-4(f)(4).

If an action for damages does not exist by statute, there is no legal remedy for exclusion of such an individual from admission into a voluntary organization no matter how arbitrary or unjust the exclusion. 6 AmJur 2d, Associations and Clubs §18; 7 C.J.S. Associations, §23, page 56.

Sullivan

Sullivan's constitutional question is derivative from Freeman, without Freeman he has no position in this Court, unless the First Amendment applies to us all and harassment of individuals, under the claim of free speech, is not cause for a disassociation of social contact with the harasser.

THE FIRST AMENDMENT, FOURTEENTH AMENDMENT AND THE CIVIL RIGHTS ACT OF 1866

Sullivan

Sullivan first contends that the respondents violated his rights under the First Amendment in expelling him from membership since his activities were an exercise of his free speech.

Realizing that the First Amendment applies to state action, his contention is that the operation of Little Hunting Park is a public function and as such "may not permissibly condition the use of its property upon the forfeiture of an individual's First Amendment rights". Also, he contends that "by giving sanction to Sullivan's expulsion, the state court deprived Sullivan of his rights, guaranteed by the First Amendment, to criticize the conduct of the association's directors, who by virtue of holding that position in community life, had become "public figures".

Despite the operation of the respondent club over the years and recognition of the restriction on membership by the petitioners, they rely most strongly on the word "community" used in the Certificate of Incorporation as their basis for determining that the club operated a public function.

Webster's New Collegiate Dictionary, Second Edition, lists five meanings for the word "community":

1. A body of people having common organization or interests or living in the same place under the same laws; hence an assemblage of animals or plants living in a common home under similar conditions.

2. Society at large; the people in general, restrictedly, the people of a particular region, or the region itself.

3. Joint ownership or participation; as, a community of goods, community of interests.

4. Common character; likeness.

5. Ecol. An aggregate of organisms. . . . . .

Webster's preface tells us that "the earliest ascertainable meaning is placed first and later meanings are placed in the order shown. . . . . " .

It is quite apparent that the scrivener of the certificate of incorporation was not writing on biology and, therefore, did not intend to use the fifth meaning. Did he intend the second meaning as supposed by the petitioners? It is hard to imagine that the word was selected to mean that society at large was intended to use the facilities, when contemporaneously there was drafted by-laws which provided that the facilities were intended for the corporation's members.

A further argument to bring this matter under state control, is that since the respondents provide a facility that is provided in other jurisdictions by the state, therefore, the facility is a public facility and the directors of the club are "public figures".

It is hard to imagine any facility that is not provided by the state. The state is in the grocery business, through commissaries, housing, education, pre-natal care through burial. Religion is not exempt, for the "state" dispenses morality through chaplains in the armed services and national guard. To carry this argument to an extreme, the grocer, landlord, educator, doctor and mortician must accept the abuse of every crackpot who disagrees

with his ideas or the method of his doing business because to preserve his "right not to listen" would abridge the crackpot's right of free speech.

In pursuing his argument that the state court action brings this matter under the First Amendment, he contends that "the trial court invoked a standard of state law which had the effect of depriving Sullivan of rights protected by the First Amendment". The respondents did not seek court action, Sullivan brought this action to overturn the action of the respondent club in expelling him from membership. This puts the state court in the position of ruling — "It is the opinion of the court that the First Amendment does not apply to private individuals but if we are to rule that way, since we are an arm of the state, the First Amendment would then apply to the individuals".

Failing a standing on his own right before the Court, Sullivan then proceeds to exert the constitutional rights of Freeman as justificaton for his relief, stating that he was punished because he demanded rights for Freeman. *BARROWS v. JACKSON*, 346 U.S. 249, 73 S.Ct. 1031, contains the following:

> Apart from the jurisdictional requirement, this Court has developed a complimentary rule of self restraint for its own governance (not always clearly distinguished from the constitutional limitation) which ordinarily precludes a person from challenging the constitutionality of state actions by invoking the rights of others. See *ASHWANDER v. TENNESSEE VALLEY AUTHORITY*, 297 U.S. 288, 346 - 348, 56 S.Ct. 466, 482-483, 80 L.Ed. 688
>
> (concurring opinion).

The respondents satisfied the trial judge that there was ample evidence to warrant expulsion of Sullivan on the basis of the charges made against him. The petitioners' statement that "The expulsion was unquestionably retaliatory" is not contained in any evidence before the court.

The petitioners disagree with the learned trial judge who found "ample evidence to justify its conclusion that the complainant's acts were inimicable to the Corporaton's members and to the Corporation". To justify their disagreement they state that the allegations against him are completely false, or exaggerated and distorted, then proceed to justify his reasons for the acts charged by the respondents.

The charges against Sullivan by the respondents were false because Mr. Sullivan said they were so. For example, one of the charges was that he instigated a harassment of the board by numerous unfriendly telephone calls. He testified that he did not know of any telephone calls (hence they were not made) but had asked people to write letters. But in answer to the second question thereafter he stated that a Mr. Sutherland called. (A 73, 74)

The purpose of Little Hunting Park was social. The members gathered for parties (A 228) in an atmosphere of compatibility and fellowship. The disruption of this compatibility and fellowship was inimical to the corporation and its members.

Sullivan instituted an action in the Circuit Court of Fairfax County to postpone the expulsion hearing, requesting the right of counsel at the hearing and a bill of particulars. (A 70, 71, 82, 83, 84, 85) In open court, the parties stipulated that the respondents would post-

pone the hearing, allow counsel of Sullivan's choosing at the hearing and provide him with a list of the charges against him. Sullivan stipulated that he would call a membership meeting and abide by the decision of the membership. (Petitioner's Brief, page 40).

His request for a membership meeting contained three directives to the membership (A 201) and counsel for the corporation, in the notice of the meeting, changed these directives to questions (A 203). Even though the vote was overwhelmingly against him, he has refused, and continued to refuse, to adhere to his stipulations filed in court.

His brief states on page 40, footnote 29, that "the stipulation was noted by the trial judge, but he specifically refused to pass on it. It is clear, however, that the terms of the stipulation were never met. . . . . " The meeting was held but the agenda was different.

The trial judge did not rule on the stipulations but used the following language in his decision letter (A 232):

> I do not find it necessary to pass on the defense a valid compromise and settlement and that that the stipulation of July 16, 1965, constituted under it the complainant is prevented from taking further action, *although I am inclined to the view that such is the case.*
>
> (Italics supplied)

The fact that filing suit by a member of a voluntary association may not be grounds for his expulsion is granted, but this does not extend to a case where the member refuses to abide by the decision rendered in the suit.

THE THIRTEENTH AMENDMENT, THE FOURTEENTH AMENDMENT AND THE CIVIL RIGHTS ACT OF 1866

Freeman

In his lease to Freeman, Sullivan included a provision to the effect that in addition to the premises, he also included his membership certificate in the respondent club, Little Hunting Park, Inc. It is basic contract law that one cannot bargain away what is not his nor can he bind a third party to his contract against the will of the party and without his consent.

There is no contention that Little Hunting Park was a party to the lease nor is there any contention that the parties to the lease did not know that it was necessary for the approval of the Board of Directors before the membership privileges could be transferred. To the contrary, the petitioner Freeman submitted his application in writing as required by the by-laws of the corporation.

It appears from the manner in which the petitioner's brief is written that the transfer of a membership certificate was routine with the transfer of a residence. The residence leased to Freeman was in a subdivision known as Bucknell Manor which consisted of 800 homes of which 115, or roughly 15%, belonged to the respondent club. (A 163) Conversely, 85% of the residents of this subdivision did not belong to the respondent club. The vast majority of the members of the club were homeowners and not tenants.

To bring his case within the scope of 42 U.S.C. § 1982, it is Freeman's contention that the failure of the club to admit him to membership, deprived him of his right to lease real property "as is enjoyed by white

citizens thereof". He requests a privilege that is not available to eighty-five percent of his neighbors, white and negro.

JONES v. MAYER CO., supra, interpreted § 1982 to the extent that it was a valid exercise of Congress to enforce the Thirteenth Amendment to bar all racial discrimination in the sale or rental of property. The purpose of the statute was to abolish the Black Codes and eliminate the vestiges of slavery. The statute is limited to members of the negro race and does not apply to discrimination because of creed or national origin. The stated purpose of the law is to give all citizens the same right as is enjoyed by white citizens.

But does the white citizen have a "right" to join voluntary social organizations? The grant or refusal of membership in a voluntary association is a matter within the complete control of the organization which has the power to enact laws governing the admission of members and to place restrictions on the right of admission. In other words, membership is a privilege. . . . . 7 C.J.S. Associations § 23, page 56.

To make this privilege a matter of right to members of the Negro race would give the Negro not the same right as is enjoyed by white citizens but a far superior right which would be contrary to the wishes of the drafters of the legislation and those who truly believe in equal rights for the minorities in our midst.

Justice Stewart, in *JONES v. MAYER CO.*, supra, states:

> Thus, although § 1982 contains none of the exemptions that Congress included in the Civil Rights Act of 1968, it would be a serious mistake to suppose that § 1982 in any way diminishes

the law recently enacted by Congress.

It would follow that it would also be a serious mistake to suppose that §1982 would diminish the Civil Rights Act of 1964, 42 U.S.C. 2000, et seq. The actual contention of the petitioners is not one of leasing property but actually of public accommodations. For in no way did the respondents interfere with his rental of property. Section 201e of the 1964 Act provides:

> The provisions of this title shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilties of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b).

Subsection (b) contains the requirement that law applies to certain establishments if its operations affect commerce, or if discrimination or segregation by it is supported by the State.

There is no contention, by the petitioners, that the premises are open to the public or that its operations affect commerce. To the contrary, their suit to compel admission as members and their contention is that it is limited to the "community".

They do contend that the directors are "public figures" but from the reading of their brief it would appear that this is to place Sullivan under the shelter of the First Amendment and in support thereof they cite *CURTIS PUBLISHING CO. v. BUTTS*, 388 U.S. 130, a libel suit decided on the First Amendment.

The further contention of the petitioners is that 42 U.S.C. § 1981 giving all persons the same right "to make and enforce contracts" applies to the contract or lease executed by Sullivan and Freeman. The purpose

of the law's equality and the word "same" is used to apply to "all" persons.

If under the same circumstances, Sullivan and Freeman were both of the White race, we would probably not be before this Court for the simple rule of contracts would apply. One of two situations would prevail, either Sullivan had informed Freeman that membership was subject to the approval of the Board of Directors and Freeman took subject to that condition and had no claim against Sullivan, or Sullivan did not inform Freeman of the contingency and is responsible to Freeman in damages.

JONES v. MAYER Co. supra, involved the public offering of houses by the respondent. The offer was accepted by petitioners and performance was refused by the Mayer Company. There is no analogy to the present case. The respondent club was not in privity with the makers of the lease, had no knowledge of the lease, and did not offer to contract with either party nor did they accept an offer from either party. The relationship between the association and prospective member is one of contract and agreement is required by both parties. 6 Am.Jr. 2d §18.

To carry the petitioners' argument to a ridiculous extreme, Sullivan could have included in his lease the use of his neighbor's lawnmower which is necessary to properly maintain the lawn on the premises. If the neighbor says "no" is he then violating Freeman's right to contract or to lease property under Sections 1981 and 1982?

The petitioners place great weight on the desirability of a swimming pool in the neighborhood and submitted opinions to that effect. (A 253 through 266). The

opinions are directed to builders to stimulate the sale of their homes. However, the residents of Bucknell Manor apparently do not agree with the opinion of the "Practical Builder" for less than 15% have joined the respondent club. The admonition to the builder in the "Practical Builder" is for *him* to build recreational facilities to enable a quicker sale of his houses. The "puffing of the wares" of a real estate broker that there is a country club or recreational facilities in the area, does not mean that the purchaser has the right to such facilities nor does it, per se, increase the value of the realty.

JONES v. MAYER, supra, interpreted 42 U.S.C. § 1982 by a reference to the debates of Congress (Congressional Globe, Vol. 71, pps. 522 et seq.) to determine the intent of the framers. Senator Trumbull, the sponsor of the bill, stated:

> This bill has nothing to do with political rights or "status" of the parties. It is confined exclusively to their civil rights, such rights as should appertain to every free man.

On the house side, Representative Wilson, after quoting pertinent sections of the bill, then said:

> It provides for equality of citizens of the United States in the enjoyment of civil rights and immunities. What do these terms mean? Do they mean that in all things civil, social, political, all citizens, without distinction, shall be equal? By no means can it be so construed. . . . . .

By no means can § 1982 be construed to regulate the social rights of men.

CONCLUSION

A decision in this case, favorable to the petitioners, would:

1. Take away from the State Court the right to fix reasonable rules of procedure for the maturing of appeals before that Tribunal.

2. Set a precedent to allow this Court to consider questions that are not in controversy and burden the Court wth moot matters.

3. Substantially change the existing law of contracts to the extent that parties to a contract could bind those not in privity, if one of the contracting parties were of the Negro race.

4. Substantially hinder the right of association of citizens. The argument submitted by the petitioners could apply to every country club which, by necessity, must serve those in the contiguous community. Incompatibility, which is a nebulous reason, could still be a reason for exclusion from clubs but when applied to a member of the Negro race, it would be presumed that race would be the reason for such incompatibility.

5. Be contrary to the intent of Congress, the thirty-ninth and the eighty-eighth, which saw fit to exclude the respondent from the Civil Rights Act of 1964.

For the foregoing reasons, the Supreme Court of Appeals of Virginia should be affirmed and the writ dismissed.

Respectfully submitted,
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INDEX

363-010—69——1

CITATIONS

Cases:

Cases—Continued

Constitution and statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 33

PAUL E. SULLIVAN, ET AL., PETITIONERS

v.

LITTLE HUNTING PARK, INC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The decision of the trial court in the *Sullivan* case (A. 232–234), which is in the form of a letter to counsel, is not officially reported but is printed in 12 Race Rel. L. Rep. 1008. The trial court's opinion in the *Freeman* case (A. 235–236), also contained in a letter to counsel, is unreported. The orders of the Supreme Court of Appeals of Virginia rejecting the appeals from the trial court (A. 242, 243) are not reported. The opinion of this Court (A. 244) granting the previous petition for a writ of certiorari and vacating the judgments of the Virginia Supreme Court is re-

ported at 392 U.S. 657. The opinion of the Supreme Court of Virginia on remand (A. 247–249) is reported at 209 Va. 279, 163 S.E. 2d 588.

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was entered on October 14, 1968 (A. 249-250). The petition for a writ of certiorari was filed on January 10, 1969, and granted on April 1, 1969 (A. 251; 394 U.S. 942). The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

Although the parties have briefed additional issues, we address ourselves only to the following questions, involving the proper construction and application of the Civil Rights Act of 1866 (42 U.S.C. 1981, 1982):

1. Whether a leasehold interest in membership in privately owned community recreational facilities located in the community where a Negro citizen makes his home is "property" which may not be withheld from him solely on the basis of his race under 42 U.S.C. 1982.

2. Whether a white person may secure judicial relief from the retaliatory acts of parties affected by his compliance with 42 U.S.C. 1982 in dealings with a Negro.

3. Whether, in appropriate circumstances, plaintiffs prevailing in actions arising under 42 U.S.C. 1982 may recover monetary damages.

STATUTORY PROVISIONS INVOLVED

Section 1982 of Title 42 of the United States Code, Revised Statutes § 1978, provides as follows:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

INTEREST OF THE UNITED STATES

The United States has a continuing interest in eradicating discriminatory practices which deny to the members of any group, on account of their race, access to certain residential communities, to places of public accommodation or to community recreational facilities—especially those practices which tend to fence out the Negro from an entire area, and to segregate housing arrangements. The laws of the Nation attest that concern—including the Civil Rights Act of 1866 invoked here, Title II of the Civil Rights Act of 1964 and Title VIII of the Civil Rights Act of 1968. The appearance here is consistent with the government's participation in such cases as *Shelley* v. *Kraemer,* 334 U.S. 1; *Boynton* v. *Virginia,* 364 U.S. 454; *Burton* v. *Wilmington Pkg. Auth.,* 365 U.S. 715; *Garner* v. *Louisiana,* 368 U.S. 157; *Peterson* v. *Greenville,* 373 U.S. 244; *Bell* v. *Maryland,* 378 U.S. 226; *Evans* v. *Newton,* 382 U.S. 296; *Reitman* v. *Mulkey,* 387 U.S. 369; *Jones* v. *Mayer Co.,* 392 U.S. 409; *Hunter* v. *Erickson,* 393 U.S. 385; *Daniel* v. *Paul,* 395 U.S. 298.

This particular case, however, presents a special and more direct federal concern. Dr. T. R. Freeman, Jr., one of the petitioners and the victim of the discrimination charged, was an employee of the federal govern-